90-728

No. _____

In The

Supreme Court of the United States

October Term, 1990

RICHARD R. SYRE,

Petitioner,

vs.

PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari To The Pennsylvania Superior Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an appellate court acquittal setting aside a conviction on grounds that the prosecutor's evidence is insufficient to sustain the conviction bar government appeal under the Double Jeopardy Clause?

PARTIES TO THE PROCEEDINGS

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Respondent.

On Petition For A Writ Of Certiorari To The Pennsylvania Superior Court

PETITION FOR WRIT OF CERTIORARI

STATE COURT RULING SUBJECT TO REVIEW

Appeal is taken from Judgment of the Pennsylvania Superior Court entered March 27, 1990, affirming Judgment of sentence of the Philadelphia Court of Common Pleas which judgment became final when the Pennsylvania Supreme Court denied Petition for Allowance of Appeal on September 6, 1990.

JURISDICTIONAL STATEMENT

risdiction of the United States Supreme Court is inv ed pursuant to 28 U.S.C. 1257(3).

VERBATIM CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution:

" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . "

STATEMENT OF THE CASE

This appeal concerns the legality of a sentence entered by the trial court after the state court of appeals entered a verdict of acquittal on the same charges. In 1981 your Petitioner, Richard Syre, a practicing attorney, was convicted by a jury of witness tampering. The trial court originally sentenced Syre to provide community legal services for a year and stay within 100 miles of Philadelphia.

Syre rejected the sentence as unlawful because it conditioned his continued practice of law on admitting witness tampering, which had not been proven, while it punished him for appealing the unjust conviction by disbarment through enforcement of rules of automatic suspension. On appeal Syre requested retrial citing numerous trial errors. He also appealed the trial court's denial of his demurrer accepting the cost of automatic suspension from the practice of law as the price of appeal.

On appeal the Pennsylvania Superior Court acquitted, finding the evidence insufficient to sustain the conviction. *Commonwealth v. Syre,* 469 A.2d 1059 (Pa. Super. 1983). On government appeal the Pennsylvania Supreme court reversed and remanded. *Commonwealth v. Syre,* 489 A.2d 1340 (Pa. 1985). The Pennsylvania Superior Court reversed the conviction a second time finding official jury interference. *Commonwealth v. Syre,* 501 A.2d 671 (Pa. Super. 1985). On Government appeal the Pennsylvania Supreme Court reinstated the sentence a second time but without remanding, leaving many claims of trial error unresolved. *Commonwealth v. Syre,* 518 A.2d 535 (Pa. 1986), cert. denied, 107 S.Ct. 1577 (1987).

During the course of these proceedings the United States Supreme Court ruled that double jeopardy barred the government from appealing an evidentiary insufficiency decision. *Smalis v. Pennsylvania,* 476 U.S. 104 (1986). In numerous proceedings Syre unsuccessfully challenged the jurisdiction of courts to enforce any judgment that disregards his acquittal. *Syre v. Pennsylvania,* 662 F.Supp. 550 (E.D.Pa., 1987); affirmed, 845 F.2d 1015 (3d Cir. 1988); cert. denied, 102 L.Ed. 112 (1988). *Syre v. Williquette, Vilas County Sheriff,* 441 N.W.2d 756 (Wis. App. III, 1989); cert denied, 58 LW 3217.

After extraditing Syre from Wisconsin to Pennsylvania the Philadelphia trial judge imposed a modified sentence of 200 hours community service claiming jurisdiction under authority created by the Pennsylvania Superior Court in *Commonwealth v. Fitzhugh,* 520 A.2d 424 (Pa. Super. 1987). On appeal, the Pennsylvania Superior Court dismissed Syre's jurisdictional challenge as "meritless." Appendix 1-4.

Your Petitioner seeks a writ of certiorari because an appellate court acquittal, which forecloses error correction by barring retrial, is not protected from arbitrary nullification when the government may appeal the appellate court acquittal.

ARGUMENT

SUMMARY OF ARGUMENT

In discharging a defendant on grounds that the evidence is insufficient to sustain a conviction beyond a reasonable doubt the appellate court finds "that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks v. United States*, 437 U.S. 1, 16 (1978). If this judgment of the appellate court is presumed to be honest and competent then there cannot be a subsequent finding by a higher court that there is proof beyond a reasonable doubt on the same evidence that the lower appellate court rejected as insufficient without impeachment of the court.

VERDICT NULLIFICATION

Double jeopardy is a matter of simple logic and the Constitution's concern for the independence and integrity of the court. Yet legal journals bemoan the "poor state of health" of Supreme Court double jeopardy analysis. *Double Jeopardy: Are the Pieces the Puzzle?*, McKay, 23 Washburn Law Journal 6 (1983). The United States

Supreme Court deprecates its own double jeopardy jurisprudence as an unnavigable "Sargasso Sea". *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

In *Burks v. United States*, the U.S. Supreme Court ruled for the first time that double jeopardy bars retrial after the appellate court finds the evidence insufficient to sustain a conviction since the ruling is an acquittal – a "resolution, correct or not, of some or all of the elements of the offense charged." (Hereinafter referred to as a court ordered acquittal or verdict of not guilty.) By its terms this definition excludes government appeal. Nevertheless, government appeal of court ordered acquittals continued.

In *Smalis v. Pennsylvania*, 476 U.S. 104 (1986), the Supreme Court ruled that double jeopardy barred government appeal of a pre-verdict trial court ordered acquittal because it is a decision "on the facts" not "on the law." Nevertheless, government appeal of post-verdict court ordered acquittals continues in most, if not all, jurisdictions for lack of understanding of double jeopardy principles.

In reversing a jury conviction for lack of evidence the court, unlike the jury, must presume the honesty and integrity of the prosecutor's evidence. The court acquits on narrower grounds, namely, the rational deficiency of the proof. The court's conclusion, if it is in turn presumed to be honest and competent, must end the prosecution.

As regards verdicts, the fact/law distinction in double jeopardy jurisprudence is unfortunate because it introduces a level of abstraction concerning the ultimate distinction between fact and law that has little to do with

the practical standard of "proof beyond a reasonable doubt." A more fruitful inquiry asks what definitions of fundamental terms are necessary within an accusatory process.

The standard of proof in a criminal case cannot be so low as to allow the innocent to be easily convicted. Neither can the standard of proof be so high that the guilty are never convicted. Consequently, proof is defined in terms of a consensus between reasonable minds as to whether or not the government proved its criminal charges.

"Proof beyond a reasonable doubt" is defined in terms of the reasonableness of those selected to decide guilt or innocence. When no consensus as to proof beyond a reasonable doubt is possible because the prosecutor's evidence is rationally deficient the court has the duty in law and conscience to terminate the proceedings on grounds restricted to a finding that a reasonable person could not conclude beyond a reasonable doubt that the defendant is guilty.

Criminal charges can be proven to be true or false because they are specific allegations of fact. Innocence is verified only by the decision maker's expression of doubt in a general verdict of not guilty which is presumed to be an honest and competent judgment.

Reinstatement of a conviction, set aside for lack of evidence, impeaches the court that acquitted by rejecting the presumption. If the acquittal was a just one setting aside a false conviction, perhaps one secured through official jury interference, the higher court would impeach

itself absolutely on specific allegations of fact the falsity of which can be proven.

Acquittals sometimes are specific apparently creating the same problem of self-impeachment. When defendants offer affirmative defenses the court ordered verdict of not guilty appears to be based upon the defendant's specific factual claims, (self-defense, accident, lack of intention, etc.) not his general denial of guilt.

When the facts as pleaded by the defendant do not meet the requirements of law for justification of the crime an incorrect court ordered acquittal in content, but not in form, constitutes a ruling "on the law" where reasonable minds may disagree. This is a source, perhaps the only honest one, for the notion that evidentiary insufficiency decisions are rulings "on the law."

To protect the accusatory process from self-impeachment the defendant is not permitted to plead and prove facts. He is presumed innocent until proven guilty. This form of proceeding must be consistent and, therefore, when the defendant succeeds with an affirmative defense the verdict of not guilty is still restricted in its meaning to a failure of government proof.

In the administration of the accusatory process the honesty and competency of the decision makers is always presumed. No principled review of decisions is possible otherwise.

The Constitution, on the other hand, assumes that judges and prosecutors are not perfect – that the accusatory process will be used occasionally to oppress rather than to seek the truth. The Bill of Rights acknowledges

the probability of certain abuses of the accusatory process in its enumeration of trial rights.

There can be correction of error but not placing of blame within the same proceedings. The double jeopardy bar on government appeal protects the verdict from arbitrary nullification. The double jeopardy bar on retrial denies to the prosecutor unlimited power to retry. Double jeopardy does not, however, bar the court from ordering a retrial to cure trial errors that render a fair trial questionable when there is no verdict terminating the proceedings.

FACT/LAW CONFUSION AS TO LEGAL RULINGS

Much confusion in double jeopardy jurisprudence stems from failure to define the verdict of not guilty, as discussed above. Another source of confusion is the misconception that the "hardship of retrial" on the defendant is the evil at which double jeopardy is aimed.

When retrial is the prohibited evil, then any decision "after jeopardy attaches" in favor of the defendant that makes retrial necessary becomes a judgment that is "absolutely final, correct or not." On the other hand, any decision in favor of the defendant that can be reversed without the necessity of a retrial is not final. When timing of the decision in favor of the defendant is essential to the question of finality the question of finality is governed by accident not principle.

In *Burks v. United States*, 437 U.S. at 14-15, the United States Supreme Court noted that failure to make the

distinction between "reversals due to trial error and those resulting from evidentiary insufficiency" was the source of "conceptual confusion" in double jeopardy jurisprudence. *Burks* and *United States v. Scott*, 437 U.S. 82 (1978), decided the same day, correctly eliminated timing distinctions in finding that retrial of the defendant was barred only when the facts were found in his favor. Post *Smalis* decisions such as *Fitzhugh* allow government appeal when a jury conviction, set aside on grounds that the evidence is insufficient to sustain the conviction, can be reinstated "because no retrial is required – the court can simply reinstate the original verdict." Appendix 3. This statement begs the question that the original verdict is free of trial error review of which is made unnecessary by the general verdict of not guilty simply nullified on government appeal. These decisions make the finality of the verdict of not guilty turn on when it is entered not what it means. They contradict the holdings of *Burks*, *Scott*, and *Smalis*.

The United States Supreme Court correctly limits the definition of verdict to the fact finder's decision on the evidence that is material to the charges – the government's accusations. *Scott*, at 97-98. The absolute finality of verdicts is, therefore, clear as a matter of definitions compelled by the structure and purpose of the accusatory process.

It does not follow, however, that all other decisions favorable to the defendant setting aside convictions are in principle indistinguishable as rulings "on the law" where reasonable minds may disagree. The double jeopardy bar on government appeal must be broader than the bar on retrial.

Questions concerning what happened during the trial process involve factual allegations made by the defendant, proof of which is not governed by the rules of the accusatory process. These are contested jurisdictional facts. Some jurisdictional facts, such as the existence of a verdict, proven conclusively by the trial record, are beyond denial. Others, such as court deliberations, are beyond inquiry. Contested jurisdictional facts concerning what happened at trial require limited fact finding for the limited purpose of deciding on the need for a retrial.

Facts bearing on unfair trial procedures are shown by lesser standards of proof in a process that is not accusatory: The court is not neutral but an involved party; reason to believe is at issue not proof beyond reasonable doubt; punishment is not the objective of the proceeding but rather retrial or termination; and there is not a presumption of innocence – on the contrary there is often a strong, sometimes conclusive, presumption of trial error.

A line of Supreme Court cases wherein the Court states that the appellate court will not defer to factual determinations by the lower court suggests an area where government appeal might be barred by double jeopardy. *Miller v. Fenton*, 474 U.S. 104 (1985). When those determinations of jurisdictional fact are made in the defendant's favor, the government should be barred from appeal when it has the option to retry the defendant.

No government interest is advanced by allowing government appeal of a finding of official interference with jurors. In an extreme case where the prosecutor interferes with jurors, the appeal itself is an obstruction of justice that serves the prosecutor's general denial of

wrongdoing while it burdens the judicial system with vexatious compromise.

Government appeal is less objectionable where the lower court wrongly suppresses evidence of guilt or where the incorrect finding of error, such as pre-indictment delay, bars the government from retrying the defendant.

A consistent double jeopardy theory is already indicated by the United States Supreme Court rulings. Unquestionably verdicts bar both retrial and government appeal. It is safe to predict that further limitations on government appeal in criminal cases will parallel statutory schemes that were abandoned as the Supreme Court struggled to define double jeopardy.

CONCLUSION

Your Petitioner requests that the United States Supreme Court specifically overrule *Fitzhugh* and like cases in all jurisdictions as inconsistent with its present understanding of double jeopardy by granting certiorari to the Superior Court of Pennsylvania and setting aside the Petitioner's sentence entered after the Pennsylvania Superior Court acquitted your Petitioner.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICHARD SYRE,	:	No. 02243
Appellant	:	Philadelphia 1989

Appeal from the Judgment of sentence August 23, 1989 in the Court of Common Pleas of Philadelphia County, Criminal, July Term, 1981, No. 2676, 8107-2671 1/1.

(FILED MAR 27 1990)

BEFORE: CIRILLO, P.J., and CERCONE and HESTER, JJ.

MEMORANDUM:

This is an appeal from a judgment of sentence entered in the Court of Common Pleas of Philadelphia County. Appellant Richard Syre, a practicing attorney, was convicted by a jury of tampering with a witness. Following trial, Syre was sentenced to two years probation and one year of community service. Syre was also ordered to stay within a 100 miles radius of Philadelphia. Syre filed a direct appeal and this court reversed, finding the evidence was insufficient to support a conviction of tampering with a witness. *Commonwealth v. Syre*, 322 Pa. Super. 416, 469 A.2d 1059 (1983). The Pennsylvania Supreme Court granted the Commonwealth's petition for allocatur and reversed, concluding that the evidence was sufficient to support the verdict. *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985). Judgment of sentence

was reinstated, and the case was remanded for consideration of Syre's remaining claims. This court, on remand, again reversed the judgment of sentence, finding that an officer of the trial court had engaged in improper communications with the jury during the trial. *Commonwealth v. Syre*, 348 Pa. Super. 110, 501 A.2d 671 (1985). The Pennsylvania Supreme Court granted the Commonwealth's second allocatur petition, reversed this court, and again reinstated judgment of sentence. *Commonwealth v. Syre*, 513 Pa. 1, 518 A.2d 535 (1986).

The sentencing court reimposed Syre's sentence, which had been stayed pending appellate proceedings. Thereafter, the Commonwealth filed a petition for revocation of probation because Syre had refused to comply with the condition that he remain within a 100 mile radius of Philadelphia. Following a hearing, the court sentenced Syre in accordance with the previous sentence, but vacated the requirement that he remain in Philadelphia and permitted him to remain under the supervision of Wisconsin officials. In addition, the court required Syre to undergo psychiatric counseling. This appeal followed.

On appeal, Syre argues that the principles of double jeopardy should have barred the Commonwealth's appeal of this court's decision on the issue of sufficiency of the evidence, which resulted in his discharge, and that the court of common pleas should have discharged him on the basis of double jeopardy. We disagree.

In *Commonwealth v. Fitzhugh*, ___ Pa. Super. ___, 520 A.2d 424 (1987), this court specifically rejected the

argument that double jeopardy principles bar the Commonwealth's appeal of an evidentiary insufficiency decision entered by an intermediate appellate court, such as this court:

> [W]e find that an arrest of judgment entered following a jury verdict of guilt does not become the functional equivalent of a verdict of acquittal until a final appellate decision upon the legal sufficiency of the evidence is made in the defendant's favor. A decision by an intermediate appellate court, including a trial judge entertaining post-trial motions, does not terminate the initial jeopardy. Thus, the Commonwealth may properly appeal the order granting an arrest of judgment.

Id. at 226, 520 A.2d at ___. Thus, where a defendant is acquitted of the crime or crimes charged, initial jeopardy terminates. A subsequent prosecution would subject the defendant to fact-finding proceedings, and again place the defendant in jeopardy. *See Comonwealth v. Smalis*, 331 Pa. Super. 307, 480 A.2d 1046 (1984), *rev'd sub nom. Comonwealth v. Zoller*, 507 Pa. 344, 490 A.2d 394 (1985), *rev'd sub nom. Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Thus, unlike a verdict of acquittal, which, for purposes of the double jeopardy [sic], terminates the initial jeopardy, a guilty verdict carries the initial jeopardy through the appellate process because no retrial is required – the court can simply reinstate the original verdict. *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308-309 (1984) (when acquittal is entered by the original finder of fact, the initial jeopardy terminates; but when a verdict of guilt is delivered, the original jeopardy continues through the appellate process).

Here, Syre was convicted by a jury. The jeopardy which attached at that trial did not terminate upon conviction, as it would have had be been acquitted. Thus, since initial jeopardy did not terminate, Syre was not twice placed in jeopardy. We therefore conclude that Syre's jurisdictional challenge is meritless.

Affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICHARD SYRE,	:	No. 02243
Appellant	:	Philadelphia 1989

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: MARCH 27, 1990

NO. 90-728

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD R. SYRE,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where petitioner was convicted by a jury of tampering with a witness, and where petitioner's conviction was twice upheld by Pennsylvania's highest court on respondent's successful appeals from erroneous decisions of the intermediate appellate court, does the double jeopardy clause preclude the imposition of sentence following the decision of the state trial judge that petitioner had violated his probationary sentence?

2. Do this Court's decisions in Smalis v. Pennsylvania, 476 U.S. 140 (1986), and Burks v. United States, 437 U.S. 1 (1977), prevent a state prosecutor from appealing to the state's highest court where an intermediate appellate court has entered an erroneous and insupportable ruling purporting to discharge petitioner from his jury tampering conviction despite

legally sufficient evidence to support the guilty verdict below?

3. Does Pennsylvania's statutory scheme for successive appeals through a hierarchy of appellate courts violate constitutional principles of double jeopardy as applied to the states where the prosecutor appeals legal error in a criminal case?

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COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ORDERS AND OPINIONS BELOW

The unreported memorandum opinion of the Pennsylvania Superior Court, which affirmed the new probationary sentence imposed on petitioner following his extradition from Wisconsin and the revocation of his original period of probation by the Pennsylvania trial judge, is set forth in petitioner's appendix at A-1 to A-4. The

Pennsylvania Supreme Court denied discretionary review of the Superior Court's affirmance of these probation proceedings by order entered September 6, 1990.

Earlier opinions of the Pennsylvania Superior Court and the Pennsylvania Supreme Court on direct appeal are reported as follows: Petitioner's initial appeal to the Pennsylvania Superior Court, which granted a discharge on sufficiency grounds, is reported at Commonwealth v. Syre, 322 Pa. Super. 416 (1983). The decision of the Pennsylvania Supreme Court, reversing the Superior Court's discharge for insufficient evidence, reinstating petitioner's judgment of sentence and remanding to the Superior Court for consideration of petitioner's remaining appellate claims, is reported at Commonwealth v. Syre, 507 Pa. 299 (1985). On remand, the Superior Court granted petitioner a new trial for supposed error based on the comment of a court officer. That

Superior Court decision is reported at Commonwealth v. Syre, 348 Pa. Super. 110 (1985). The subsequent decision of the Pennsylvania Supreme Court, again reversing the Superior Court's grant of relief, is reported at Commonwealth v. Syre, 513 Pa. 1 (1986), cert. denied, 480 U.S. 935, 107 S. Ct. 1577 (1987).

JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, which provides:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb

United States Constitution, Amendment Fourteen, which provides:

> No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTER-STATEMENT OF THE CASE

Petitioner, a former Teamsters lawyer, now disbarred by the Pennsylvania Supreme Court, was convicted by a jury of witness tampering in violation of Pennsylvania law, see former 18 Pa. Cons. Stat. Ann. §4907. This is petitioner's fourth attempt to gain certiorari review in this Court. His present petition, like the three which preceded it, should be denied.[1]

---

[1]Petitioner was initially charged with two counts of witness tampering. As to one count, the jury returned a verdict of not guilty. This not guilty verdict was, of course, final as to that count and was not at issue further. See Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957). Petitioner, however, was convicted by the jury of a second count of witness tampering. It is that conviction which was before the Pennsylvania Supreme Court and (continued...)

Petitioner was adjudged guilty following a 1981 jury trial at which the credited evidence established that he bribed the complainant in a criminal prosecution of petitioner's Teamster clients. According to tape-recorded evidence introduced at trial, petitioner paid the witness to withdraw criminal charges. Petitioner also counselled the witness on how to avoid a subpoena and how to alter his testimony to preclude perjury charges. The jury disbelieved petitioner's explanation that the taped conversations comprised "emergency legal aid" and that petitioner's payments to the witness were in settlement of a civil, not a criminal, action. Petitioner's post-verdict motions were denied and the trial judge imposed a two-year probationary sentence conditioned on

---

[1](...continued)
which is the subject of the instant petition, and petitioner's previous petitions, in this Court.

petitioner's remaining within one-hundred miles of Philadelphia and performing community legal services for one year. The sentence was stayed pending appeal.

Consistent with Pennsylvania practice, petitioner directly appealed to the Superior Court, which, as Pennsylvania's intermediate appellate court, has initial jurisdiction of all criminal appeals, 42 Pa. Cons. Stat. Ann. §742, except in cases involving the death penalty. 42 Pa. Cons. Stat. Ann. §722. Two judges of the Superior Court, over a vigorous dissent, purported to discharge petitioner on sufficiency grounds. Commonwealth v. Syre, 322 Pa. Super. 416 (1983). In discharging petitioner, the Superior Court panel majority grossly deviated from well-settled standards of appellate review which mandate that the reviewing court evaluate sufficiency claims in the light most favorable to respondent, as verdict winner, and that

the court not substitute its own credibility findings for those of the fact finder. See, e.g., Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942); Commonwealth v. Coccioletti, 493 Pa. 103, 107 (1981); Commonwealth v. Council, 491 Pa. 434, 437 (1980). Because the Superior Court blatantly violated these fundamental precepts and disregarded the clear import of the trial evidence, respondent, as is its right under Pennsylvania law, see 42 Pa. Cons. Stat. Ann. §724, petitioned the Pennsylvania Supreme Court for an allowance of appeal from the erroneous Superior Court decision and discharge order. The Pennsylvania Supreme Court not only allowed respondent's appeal, it reversed the Superior Court, found the evidence legally sufficient to sustain the jury's guilty verdict, and unambiguously reinstated petitioner's judgment of sentence. The case was then remanded to the Superior

Court for disposition of petitioner's remaining appellate claims. Commonwealth v. Syre, 507 Pa. 299 (1985).

On remand, the Superior Court granted a new trial based on alleged error by a court officer, Commonwealth v. Syre, 348 Pa. Super. 110 (1985). Respondent thereafter again sought Pennsylvania Supreme Court review.[2] Again, the Pennsylvania Supreme Court reversed the decision of the intermediate appellate court and reinstated petitioner's judgment of sentence. This Court denied petitioner's request for certiorari. Commonwealth v. Syre, 513 Pa. 1

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[2]While petitioner's case was pending in the Pennsylvania appellate courts, he filed a civil suit against various current and former prosecutors, and court officers, in which he alleged, inter alia, that they were guilty of civil rights violations under 42 U.S.C. §1983. Petitioner's complaint was dismissed by the district court; the Court of Appeals affirmed; and this Court denied certiorari. Syre v. Pennsylvania, 662 F. Supp. 550 (E.D. Pa. 1987), affirmed, 845 F.2d 1015 (3rd Cir.), cert. denied, 488 U.S. 853, 109 S. Ct. 139 (1988).

(1986), cert. denied, 480 U.S. 935, 107 S. Ct. 1577 (1987).

On June 4, 1987, the trial court reimposed its original probationary sentence, set the amount of petitioner's community service at two hundred hours, and deleted the earlier requirement that petitioner was to remain in the Philadelphia area. The trial judge further ordered that petitioner's probation be transferred to Woodruff, Wisconsin, where petitioner then lived. Petitioner, however, refused to cooperate with the Wisconsin probation authorities or submit to their jurisdiction. Since petitioner declined to serve his probationary sentence in Wisconsin, and since he also failed to voluntarily appear before the Pennsylvania sentencing judge, respondent obtained a warrant and sought petitioner's extradition for violating probation. Petitioner was ultimately arrested and extradited from Wisconsin to

Pennsylvania. Petitioner's extradition was upheld by the Wisconsin courts, and this Court denied petitioner's request for certiorari review of the extradition order. State ex rel. Syre v. Williquette, Sheriff of Vilas County, 441 N.W.2d 756 (Wisconsin Ct. of Appeals), review denied, 443 N.W.2d 312 (Wisconsin Supreme Ct.), cert. denied, 110 S. Ct. 157 (1989).

On August 23, 1989, petitioner, having exhausted his extradition appeals, appeared before the Pennsylvania trial judge for probation revocation proceedings. Petitioner's probation was revoked, and a new two year probationary sentence was imposed. As a condition of his probation, petitioner was again directed to perform two hundred hours of community service, and to cooperate with the Wisconsin probation authorities. Psychiatric probation was also recommended. Petitioner appealed to the Pennsylvania Superior Court, which this

time affirmed the judgment of sentence, rejecting petitioner's claim that the revocation proceedings were barred by double jeopardy. Petitioner's request for discretionary review by the Pennsylvania Supreme Court was denied. He then filed the instant petition for a writ of certiorari.

Petitioner here argues, as he did during the extradition proceedings, that his 1983 Pennsylvania Superior Court discharge, which was specifically reversed by the Pennsylvania Supreme Court on the prosecutor's appeal, nevertheless constitutes a binding and final acquittal of his previous conviction for jury tampering. Petitioner would thus unilaterally abort the appellate process at an inferior level of review and thereby deny respondent its right to seek an appeal by allowance to the state's highest court. Such a limitation on respondent's appellate rights is not constitutionally required, see United States

v. Wilson, 420 U.S. 332, 95 S. Ct. 1013 (1975), and is inconsistent with both Pennsylvania's appellate court hierarchy, see 42 Pa. Cons. Stat. Ann. §724, and specific Pennsylvania case authority, which recognizes the prosecutor's right to appeal in criminal cases.[3] See Commonwealth v. Rawles, 501 Pa. 514 (1983); Commonwealth v. Blevins, 453 Pa. 481 (1973). Contrary to petitioner's assertion, such hierarchical review on a prosecutor's appeal to the state supreme court does not violate double jeopardy or otherwise infringe on any recognized constitutional right. For the

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[3]By statute in Pennsylvania, final orders of the Pennsylvania Superior Court may be reviewed by the Pennsylvania Supreme Court upon allowance of appeal by any two justices, upon petition of any party to the matter. 42 Pa. Cons. Stat. Ann. §724. See also 42 Pa. Cons. Stat. Ann. §5105(b). As this Court noted in Arizona v. Manypenny, 451 U.S. 232, 249 n.27, 101 S. Ct. 1657, 1668-1669 n.27 (1981), in the majority of states, the prosecutor possesses at least some rights to appeal from an adverse judgment in a criminal case.

reasons which follow, petitioner's request for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE, A STATE PROSECUTOR HAS THE RIGHT TO FILE AN APPEAL AND OBTAIN A FINAL APPELLATE DISPOSITION IN A CRIMINAL CASE.

Petitioner, in a confused distortion of constitutional precedent and the specific procedural facts of this case, urges this Court's grant of a writ of certiorari to consider whether double jeopardy barred respondent from appealing the erroneous discharge order of Pennsylvania's intermediate appellate court. Petitioner, relying on this Court's decisions in Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745 (1986), and Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978), claims that the Superior Court order was tantamount to a verdict of acquittal and that it was

therefore final and unappealable. Neither Smalis nor Burks supports petitioner's argument.

In Burks v. United States, supra, this Court barred a retrial where the defendant's conviction was reversed on appeal for insufficient evidence. In Burks, however, the government did not challenge the judgment of insufficient evidence or deny that it had failed to meet its burden of proof. Hence, the issue of the prosecutor's right to appeal was not before the Burks Court and was not addressed in the Court's decision.

Moreover, insofar as Burks is relevant at all, subsequent cases generally assume that the prosecutor has a right to appeal a post-verdict judgment of insufficient evidence.[4] As this Court said in Richardson

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[4]See United States v. Greer, 850 F.2d 1447 (11th Cir. 1988); United States v. Covino, 837 F.2d 65, 67-68 (2nd Cir. 1988); United States v. Sharif, 817 F.2d 1375 (9th (continued...)

v. United States, 468 U.S. 317, 323, 104 S. Ct. 3081, 3085 (1984), and Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 309, 104 S. Ct. 1805, 1813 (1984), it is only an unreversed appellate ruling of insufficient evidence that bars retrial.

Where, as here, the judgment of insufficiency has been plainly and unambiguously reversed by a higher court, and the jury verdict reinstated, the double jeopardy clause is not implicated by the

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[4](...continued)
Cir. 1987); United States v. Kellerman, 729 F.2d 281, 283 n.3 (4th Cir. 1984); United States v. Singleton, 702 F.2d 1159, 1161-1162 (D.C. Cir. 1983); United States v. Dixon, 658 F.2d 181, 188 (3rd Cir. 1981); United States v. Blasco, 581 F.2d 681, 683 (7th Cir.), cert. denied, 439 U.S. 966 (1978); United States v. Jones, 580 F.2d 219, 221-222 n.3 (6th Cir. 1978); United States v. Calloway, 562 F.2d 615, 616-617 (10th Cir. 1977); United States v. Hemphill, 544 F.2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977). See also Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970 (1981).

prosecutor's appeal.[5] Thus, this Court has consistently recognized the right of the government to appeal in a criminal case where success on that appeal would result in reinstatement of the verdict, rather than further fact-finding relating to guilt or innocence.[6]

Petitioner's reliance on Smalis v. Pennsylvania, supra, is also misplaced. In Smalis, this Court held that a state prosecutor could not appeal the grant of a demurrer where the trial judge, at the close of the state's case, but before a verdict had been entered, ruled that the evidence was insufficient to sustain a conviction. The Smalis Court barred the

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[5]See United States v. Martin Linen Supply Co., 430 U.S. 564, 570, 97 S. Ct. 1349, 1354 (1977) ("where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended").

[6]See United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054 (1978); United States v. Morrison, 429 U.S. 1, 97 S. Ct. 24 (1976); United States v. Wilson, supra.

prosecutor's appeal because a reversal would have required post-acquittal fact-findings going to defendant's guilt or innocence. Here, however, respondent's success on appeal merely restored the jury's verdict. There was no additional fact-finding as to the elements of the offenses charged, and there was no double jeopardy. See United States v. Wilson, supra.[7]

Petitioner's further attempt to gain certiorari review by characterizing respondent's state supreme court appeal as "verdict nullification" is utterly belied by the procedural facts below. See Petition for Certiorari at 4. Despite his rumblings to the contrary, petitioner was

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[7]The mere fact that further fact-finding is required does not constitute an automatic violation of double jeopardy principles. See United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187 (1978), where this Court approved a mid-trial appeal by the government when defendant had obtained a dismissal on grounds unrelated to guilt or innocence.

not acquitted; rather, he was convicted by a jury of his peers. Petitioner then appealed. Under Pennsylvania law, his appeal was first heard by the Pennsylvania Superior Court, which granted an erroneous discharge on sufficiency grounds. Respondent appealed that decision to the Pennsylvania Supreme Court, which reversed and reinstated the original jury verdict. Under well-settled constitutional standards, the Pennsylvania Supreme Court's reinstatement of the jury's verdict did not violate principles of double jeopardy. See United States v. Wilson, supra.

Nevertheless, petitioner, in an opportunistic argument that would accord fifth amendment finality to the erroneous decision of Pennsylvania's intermediate appellate court, inexplicably maintains that once a reviewing court enters a discharge on sufficiency grounds, that decision, no matter how erroneous or unprincipled, is

not subject to further appellate review. Fortunately, petitioner is wrong. Indeed, this Court has specifically refused to ascribe to a theory of constitutional finality that would interpret the reversed decision of an intermediate appellate court as an acquittal, or that would preclude the prosecutor from appealing by motion, rehearing, or certiorari from the adverse decision of an inferior appellate court. See United States v. Wilson, 420 U.S. at 345, 95 S. Ct. at 1022-1023; Forman v. United States, 361 U.S. 416, 426, 80 S. Ct. 481, 487 (1960). Petitioner, having invoked the jurisdiction of the Pennsylvania appellate courts by filing his direct appeal, had no right to benefit from Superior Court error, when, as here, that error could be corrected by respondent's appeal without subjecting petitioner to further fact-finding. See United States v. Wilson, 420 U.S. at 346, 95 S. Ct. at 1023 ("a

defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier-of-fact").[8]

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[8]In any event, since the initial appellate review in this case was undertaken by the Pennsylvania Superior Court at petitioner's request, he may not be heard to complain that his own appeal constituted a double jeopardy violation. See United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589 (1964); United States v. Ball, 163 U.S. 662, 16 S. Ct. 1192 (1896). Moreover, once petitioner began the process of appeal, he could not prevent respondent from seeking a higher level of review in the Pennsylvania Supreme Court. See Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 1759 (1970) (no double jeopardy until the initial prosecution has run its "full course").

Accordingly, petitioner's initial jeopardy did not terminate until after all levels of appellate review had been exhausted, and it is of no constitutional significance that it was respondent, rather than petitioner, who sought and obtained Pennsylvania Supreme Court scrutiny. See United States v. Steed, 674 F.2d 284, 286 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982) (whether the assessment of the evidence is at behest of the defendant, or the government, the function of the reviewing court is unchanged and the same standard of review is appropriate).

Finally, insofar as petitioner makes a comprehensible complaint concerning alleged "fact/law confusion in legal rulings," Petition for Certiorari at 8, he apparently takes the position that appellate review itself constitutes prohibited fact-finding under the double jeopardy clause. That is not the law. See United States v. Wilson, 420 U.S. at 342, 95 S. Ct. at 1021 (development of double jeopardy clause suggests that it was directed at multiple prosecutions, not Government appeals); United States v. Martin Linen Supply Co., 430 U.S. at 570, 97 S. Ct. at 1354 (same).[9] Petitioner's attempt to confuse the well-defined functions of our trial and appellate courts, and thereby to impute a double

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[9] See also United States v. Greer, 850 F.2d at 1449-1450 n.5 (appellate court reviewing sufficiency claim does not engage in fact-finding under double jeopardy clause); United States v. Dixon, 658 F.2d at 188 n.12 (same).

jeopardy violation where none exists, necessarily fails.

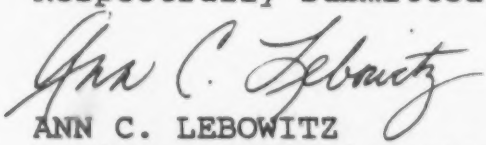
Pennsylvania trial and appellate courts perform distinct functions within a well-ordered judicial hierarchy. While the facts of a particular case are obviously important at each procedural stage, appellate courts do not replicate the fact-finding function of the trial court. Thus, an appellate court reviewing the sufficiency of the evidence does not hear witnesses, assess credibility, or make decisions concerning the weight of various items of evidence. See Glasser v. United States, supra. Rather, it is the function of the appellate court to evaluate whether the record facts, properly viewed in the light most favorable to the verdict winner, are adequate to support the fact finder's conclusions of criminality. This purely legal judgment is one which reviewing courts regularly perform "without intruding into

any legitimate domain of the trier-of-fact." Jackson v. Virginia, 443 U.S. 307, 321, 99 S. Ct. 2781, 2790 (1979). For petitioner to now suggest that this time-honored division of labor between our trial and appellate courts constitutes a violation of his rights under the double jeopardy clause is indeed a bogus constitutional claim.

CONCLUSION

For the foregoing reasons, respondent, the Commonwealth of Pennsylvania, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,



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